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Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

ASA RICHARD TALBOT,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTION PRESENTED FOR REVIEW

Whether a District Court can properly dismiss an indictment on the basis that it was returned after the same offenses had been withdrawn by a Military Court Martial convening authority for the express purpose of evading a judicial dismissal on the basis that the Defendant's Military Speedy Trial Rights had been violated.

LIST OF ALL PARTIES TO PROCEEDINGS BELOW

The caption of the case in this Court contains the names of all parties to the appeal to the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The Petitioner, Asa Richard Talbot, respectfully prays that a writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on July 31, 1987.

OPINION BELOW

On July 31, 1987, the United States Court of Appeals for the Sixth Circuit reversed the dismissal of the indictment previously entered by District Judge Thomas Higgins. A copy of that Decision is attached. Appendix A-1.

STATEMENT OF JURISDICTION

This Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit arises from a Decision by said Court rendered July 31, 1987. This Court has jurisdiction to review the judgment by writ of Certiorari pursuant to 28 U.S.C. 1254(1). See Supreme Court Rule 17.1(a), (c). An Order was entered on September 17, 1987 extending until October 29, 1987 the date within which to Petition for Certiorari.

STATUTORY PROVISIONS INVOLVED

This Petition involves the Fifth Amendment of the United States Constitution, the Sixth Amendment of the United States Constitution, 18 U.S.C. 113, Rules for Courts-Martial (R.C.M.) 304 and Rules for Courts-Martial (R.C.M.)

707. The portions pertinent to the issues raised herein are set forth below.

U.S. Const. Amend V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

18 U.S.C. 113:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished

as follows: . . .(D) Assault with intent to commit any felony, except murder or rape, by fine of not more than $3,000 or imprisonment for not more than ten years, or both."

Rules for Courts-Martial (R.C.M.) 304, Pretrial restraint:

(a) **Types of pretrial restraint.** Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) **Conditions on liberty.** Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) **Restriction in lieu of arrest.** Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) **Arrest.** Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) **Confinement.** Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. See R.C.M. 305. . ..

Rules for Courts-Martial (R.C.M.) 707,

Speedy trial:

(a) **In general.** The accused shall be brought to trial within 120 days after notice to the accused of preferral or charges under R.C.M. 308 or the

> imposition of restraint under R.C.M. 304, whichever is earlier. . . .
>
> (e) **Remedy.** Failure to comply with this rule shall result in dismissal of the affected charges upon timely motion by the accused.

STATEMENT OF THE CASE

Petitioner, Asa Richard Talbot, is a medical doctor serving as a Colonel in the United States Army Medical Corps. During times material to this case he was assigned to the Army Hospital at Ft. Campbell, Kentucky. Military Court Martial charges were brought against the Petitioner and subsequently withdrawn by the convening authority. Thereafter, a Federal indictment was returned in the Middle District of Tennessee. In order to clearly summarize the material facts the following chronology is given.

During 1985 the Petitioner Talbot, while at the Ft. Campbell Hospital geographically located in Tennessee, was accused of sexually molesting an eleven (11) year old female patient while treating her for an ear infection. As a result of this complaint the Army Criminal Investigation Division conducted an investigation. On June 29, 1985, the Petitioner's commanding officer, in an oral order: (1) relieved Talbot from his duties as a medical officer; (2) designated his living quarters as his duty stations and further that he not come to the Army Hospital unless ordered; and (3) not to contact or associate with the alleged victim or witnesses. Subsequently, a sixteen (16) year old patient made similar reports that Colonel Talbot had sexually molested her while she was hospitalized for a tonsilectomy.

On August 12, 1985, charges pertaining to these incidents and others were preferred by the commanding officer. After an investigation was performed pursuant to Article 32 of the Uniform Code of Military Justice the charges were dismissed due to the appearance of improper command influence. At this time the Petitioner was transferred to another command at Ft. Campbell, which was also authorized to convene General Courts-Martial.

On October 8, 1985, new charges were preferred against the Petitioner upon these incidents and a second Article 32 investigation was conducted. On October 29, 1985, Major General Burton D. Patrick, the Commanding General at Ft. Campbell, ordered a General Court-Martial to convene to consider the charges against Colonel Talbot. A trial was scheduled to be held on January 18, 1986.

Four days after the expiration of the continuance, the Petitioner moved on January 10, 1986 to dismiss the pending military charges asserting a denial of his right to a speedy trial in violation of Rules for Courts-Martial (R.C.M.) 707 which mandated the commencement of trial within one hundred twenty (120) days "after notice to the accused of preferal of charges . . . or the imposition of restraint under R.C.M. 304, whichever is earlier." R.C.M. 707(a). The Petitioner argued that the one hundred twenty (120) day period began on June 29, 1985 when he was ordered by his commanding officer not to come to the hospital, to stay away from the victims and witnesses, and to make his quarters his duty station. This one hundred twenty (120) day period, therefore, would have expired before the two month continuance was requested.

On Saturday, January 11, 1986, the day after the Petitioner filed the Motion to Dismiss, the military prosecutors advised defense counsel at a cocktail party that they did not intend to go forward with the trial. This was based upon the fact that they anticipated that the Military Judge would grant the Motion to Dismiss for the speedy trial violation. They stated that they did not want to give the Military Judge an opportunity to make this adverse ruling. It was further indicated that the matter would be referred to the United States Attorney for the Middle District of Tennessee for further prosecution.

On January 13, 1986, subsequent to a discussion of the case with the military prosecuting authorities, the United States Attorney for the Middle District of Tennessee assumed jurisdiction. On January 14, 1986, General Patrick as

convening authority, ordered that the charges pending against the Petitioner be dismissed without prejudice noting that the United States Attorney had assumed jurisdiction of the matter. This action was confirmed in a Memorandum for Record on January 24, 1986 indicating that the withdrawal of Court Martial charges was to allow referral of the offenses to the United States Attorney for prosecution in Federal Court.

A Federal Grand Jury returned an Indictment against the Petitioner on February 19, 1986, charging violations of 18 U.S.C. 113. The Indictment charged Assaults with Intent to Commit Aggravated Sexual Battery and Assault to Commit Sexual Battery.

The Petitioner appeared in Court to answer the Indictment on February 21, 1986. On April 1, 1986, the Petitioner moved to dismiss the Federal Indictment

primarily upon grounds of double jeopardy, speedy trial, and due process violations.

The District Court held an evidentiary hearing on April 8th and 10th, 1986, at the conclusion of which it issued oral Findings of Fact and Conclusions of Law and dismissed the Indictment. The District Court concluded that the one hundred twenty (120) day speedy trial limitation mandated by R.C.M. 707 had begun to run on June 29, 1985, and that the military authorities had intentionally acted in bad faith by acting in such a way as to evade the speedy trial guarantees of the Petitioner.

The Government filed Notice of Appeal and after the submission of Briefs and oral argument the Sixth Circuit Court of Appeals, on July 31, 1987, reversed the judgment of the District Court in

dismissing the indictment and remanded the matter to the District Court for further proceedings. This Petition for Writ of Certiorari has followed.

REASONS FOR GRANTING CERTIORARI

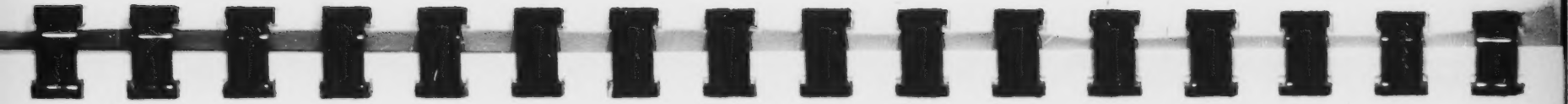
This case presents on issue for review:

Whether a District Court can properly dismiss an indictment on the basis that it was returned after the same offenses had been withdrawn by a Military Court Martial convening authority for the express purpose of evading a judicial dismissal on the basis that the Derendant's Military Speedy Trial Rights had been violated.

ARGUMENT

The unique military-civilian relationship in the instant case calls for a dismissal of the Indictment since the procedure followed is inconsistent with Fifth Amendment Due Process Rights and inconsistent with fundamental fairness.

The Sixth Circuit correctly observed that this Appeal requires an examination of the relationship between military and civilian prosecuting authorities. It is correct that the law has long recognized in a variety of context that the military, including military justice procedure, by necessity constitutes a specialized environment separate from civilian society. Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547 (1974). It has recently been observed that:



> "To accomplish it's mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." Goldman v. Weinberger, 475 U.S. 503, 505 - 506, 106 S.Ct. 1310, 1312 - 1313 (1986).

It has been recognized that this uniqueness extends to the military justice system which does have certain different procedures and protections designed to accomplish goals diverse from those served by the civilian criminal justice system. The Government, however, is wrong in alleging that the speedy trial protections in the military constitute a procedural rule unique to the military. Clearly the basic concepts of Sixth Amendment Speedy Trial provisions and Fifth Amendment Due Process protections are analogous and incorporated in their counter-part military statutes.

The Petitioner submits that the record at the District Court showed that there had been a Fifth Amendment Due Process violation so profound as to be recognized as inconsistent with fundamental fairness. It is submitted that the complained of actions violated certain "fundamental conceptions of justice which lie at the base of our civil and political institutions". Mooney v. Holonan, 294 U.S. 103, 112, 55 S.Ct. 340 (1935).

The District Court did have inherent supervisory authority over the law enforcement process that led to the Indictment in this case. The Court should be allowed to exercise their supervisory powers to fashion a remedy calculated not only to correct a miscarriage of justice in the instant case, but also calculated to deter future misconduct.

The District Judge specifically found that the court martial charges confronting the Petitioner Talbot were withdrawn by the convening authority to circumvent what the Government thought would be certain dismissal of the court martial charges and that this was done with the specific purpose of evading the rights of Talbot to a speedy trial. The Court went further to observe:

> That it's particularly egregious that the Government, acting through the prosecuting authorities, undertook to reserve unto itself the prerogative to in effect forum shop, although that term may not be all together appropriate, but in another sense it is, and to determine whether to abort the prosecution when faced with defeat under military law in an effort to salvage the prosecution in a civilian forum rather than to leave it to the independent judgment of a judicial officer. And the Court finds that that is contrary to public policy

> and would result in the possible prosecutorial abuse and is impermissible conduct. (J.A. 217)

The District Court correctly relied upon the language and rationale of Chief Justice Burger's opinion in United States v. MacDonald, 456 U.S. 1, 102 S.Ct. 1497 (1982). In the MacDonald case the military charges pending against Captain MacDonald were dismissed in good faith because of insufficient evidence and Captain MacDonald at his request was honorably discharged. A subsequent civilian indictment resulted in his conviction. Upon granting certiorari, the Supreme Court, Chief Justice Burger, held the time between dismissal of military charges and a subsequent indictment on civilian criminal charges should not be considered in determining whether the delay in bringing the defendant to trial violated his right to

a speedy trial under the Sixth Amendment. This was a correct holding.

Another important fact in MacDonald, supra, however, is that the charges instituted by the Army were totally dismissed and Captain MacDonald was legally and constitutionally in the same posture as though no charges had been made. "He was free to go about his affairs, to practice his profession, and to continue with his life." 456 U.S. at 11, 102 S.Ct. at 1503. Footnotes 11 and 12 of the MacDonald decision state as follows:

> 11. The initial Court of Appeals panel held that the prosecution by the Army and that by the Justice Department were conducted by the Government in its single sovereign capacity.
>
> 12. There is no allegation here that the Army acted in bad faith in dismissing the charges. This is not a case where the Government dismissed and later reinstituted charges to

> evade the speedy trial guarantee. The Army clearly dismissed its charges because the Commanding General of MacDonald's unit, following the recommendation of the Article 32 investigating officer, concluded that they were untrue. (Emphasis added.)

This clearly indicates that in those cases where there is a dismissal strictly for the purpose of evading the speedy trial guarantee that a Fifth Amendment due process violation will be recognized.

The decision in MacDonald discusses the fact that once charges are no longer outstanding that an individual's personal liberty is certainly not impaired to the degree as when charges are pending. The decision further recognizes that the speedy trial guarantee is designed to minimize the various types of limitations on freedom that are imposed upon a person pending trial and to shorten the disruption of life caused by arrest and

the presence of unresolved criminal charges. There is no dispute from the record in this case that the Petitioner remained under restrictions on his liberty not only throughout the military proceedings but also to the conclusion of the civilian charges.

The Government's position attempts to minimize the impact of MacDonald by simply observing that no constitutional violation was found despite a delay ten times as long as that suffered by the Petitioner in this case. The fallacy with that logic, however, is that in MacDonald the criminal defendant was discharged from the military service and had no restraints on his liberty, was not the subject of public accusation, and was not under restrictions upon his freedom, and the government action was found to be in good faith. It was specifically recognized in MacDonald that:

> "He was free to go about his affairs, to practice his profession, and to continue with his life." MacDonald at 456 U.S. 10, 102 S.Ct. at 1503.

This is clearly contrary to the situation in the instant case.

The Sixth Circuit Decision in the instant case only observes that:

> "The Court was not faced with nor did it address the question presented herein, namely whether maintenance of the federal civilian prosecution subsequent to the withdrawal of charges by military authorities was barred by due process or other considerations." (n.6).

While recognizing that the issue in this case is a novel issue, the Sixth Circuit totally overlooks the condemnation of cases "where the Government dismissed and later reinstituted charges to evade the speedy trial guarantee." (MacDonald, n.2). It is also significant that in MacDonald no

bad faith was found on the part of either the military or civilian prosecutors. In the instant case it is not denied that the military prosecutors acted in bad faith - i.e., deliberately evaded the speedy trial protections of the Petitioner, to gain a tactical advantage. Efforts such as this to gain a tactical advantage can often signify bad faith. See United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044 (1977).

The Government does not and cannot dispute the fact that the rationale and logic of MacDonald clearly supports the District Court's ruling in dismissing the charges in the instant case since there was a conclusive finding of bad faith as far as the dismissal of the military charges and that it had been done specifically to evade military speedy trial guarantees. The Sixth Circuit Decision does not recognize the

significance of this impropriety that is clearly condemned in MacDonald.

The MacDonald decision does not decide a case where the same sovereign dismisses and later reinstitutes charges to evade the speedy trial guarantee. The record in this case clearly establishes that the District Court was correct in its finding that the dismissal of the military charges was for the express purpose of evading the military speedy trial guarantees.

It is uncontradicted that immediately after the military defendant, through his counsel, filed a motion to dismiss for denial of speedy trial that at a social event the prosecutors advised the defense counsel that there was not going to be a trial since in their opinion they were going to lose the pre-trial motion dealing with the denial of speedy trial. They were not going to allow the military

judge an opportunity to make a ruling adverse to them. (Testimony of Major Shaffer J.A. 120-124).

Without contradiction defense counsel Edward Fensholt testified as follows:

> "Later in the evening I was talking with Major Millard about the case and some other attorney was also standing with us inquired as to what Major Millard thought that Judge Jacob, the senior judge at Ft. Campbell, would do with this motion. And Major Millard replied, Judge Jacob is not going to have the chance to do anything with this motion, we are convinced that he would rule against us and, therefore, we're not going to give him the chance to do that." (Fensholt testimony J.A. 135).

Mr. Joe B. Brown, the United States Attorney for the Middle District of Tennessee testified at the hearing that he was contacted by the military prosecutors about the fact that they had problems with the military speedy trial

provisions dealing with certain restrictions that had been placed upon the Petitioner. They asked him if he would consider prosecuting the case. He reviewed the file and advised them that he would prosecute certain of the same charges in Federal Court. He was uncertain as to the exact time of these conversations although it was very close in point of time to the date when military defense counsel, as quoted above, were told that there would be no further military prosecution. He specifically testified that the prosecutors were concerned with the restraints on liberty that led the District Judge to find a military speedy trial violation.

In their Brief before the Sixth Circuit the Government makes this observation:

> To be sure, we must concede that the Army trial counsel, Major Millard and Captain MacKay, terminated the military prosecution because they feared that the military judge <u>might</u> grant the defendant's Rule 707 motion. But there is no evidence in the record from which one can conclude that these officers believed that the defendant's motion <u>should</u> be granted. (Government's brief at page 27.)

The Government is in error when they use the words might and should. The proper terminology as indicated in the record is <u>would</u>. There is no question but that the military authorities thought that the military judge <u>would</u> grant the Petitioner's speedy trial motion. There is not any thing in the record that supports any conclusion other than that the military authorities withdrew the court martial charges due to the fact that they thought they would lose the speedy trial motion and the court martial charges would be dismissed.

The record does reflect that the only remedy for a violation of the defendant's military speedy trial rights would have been a dismissal of the court martial charges.

There is no dispute as to the testimony of Major Shaffer that under the 1984 Manual for Court Martial that the Government would have had the right to appeal this adverse speedy trial decision to at least the Army Court of Military Review if not to the Court of Military Appeals. (Shaffer testimony J.A. 125).

The fact that these charges were withdrawn from general court martial jurisdiction for the purpose of evading the speedy trial guarantee is further buttressed by Defense Exhibit 2 which is the memorandum for record from Major General Burton D. Patrick that indicates that the withdrawal of charges was taken to allow referral of several of these

offenses to the U.S. Attorney for prosecution in the U.S. District Court. (Defendant Exhibit 2 at J.A. 18). A copy of this Memorandum is included in the Appendix as A.2.

Since the only problem that was discussed with United States Attorney Joe B. Brown was the speedy trial aspect of this case it is clear that Major General Patrick's withdrawal of the court martial charges and referral to the civilian authorities was to avoid the speedy trial problems as caused by the conditions on liberty imposed upon Colonel Talbot.

The District Court properly held that:

> "[A]t the time he was subject to the, what the Court has called the nominal transfer from Blanchfield Army Hospital command to this HHC DISCOM, he was never relieved of the obligation of obeying those lawful orders constitution the restraints imposed on his liberty. And

even more significantly, at the time Major General Patrick, acting on the advice of and at the instance of the prosecution for the United States Government, withdrew the charges from general court-martial orally on January 14th, 1986, and later confirmed in his memorandum for the record on January 24, 1986, he made no provision for the discharge of the defendant from those restraints on his liberty.

From all the foregoing, the Court concludes that the United States Government, acting through the military prosecutors, recognized that they faced the dismissal of the charges on the defendant's motion filed January 10, 1986, if that motion came on to be heard before an independent judicial officer, that is, the military law judge, and in an effort to circumvent what was recognized as the inevitable result of delay, the United States Government, acting through the military prosecutors, obtained the dismissal of those general court-martial charges for the purpose of evading the speedy trial guarantee assured to the

defendant under military law, which is intended to implement his Sixth Amendment rights to a speedy trial.

And in this regard, the Court concludes that the government acted in bad faith in dismissing those charges and obtaining the dismissal of those charges, because it did so for the purpose of evading what it recognized was the inevitable outcome of a hearing on the motion to dismiss and in an effort to salvage the prosecution by relinquishing military jurisdiction and referring the prosecution to civilian authorities here in this district. . . . The Court does find that the commanding general possessing general court-martial jurisdiction certainly has the authority to withdraw the referral of charges within -- and that that power, that he possesses that power. But in this instance, the action taken was at the instance of and on the advice of the government military prosecutors and for the reasons stated, that is, to simply evade the certain -- what was considered by the government to be the

> virtual certain dismissal of the charges with the purpose or evading the rights of the defendant to a speedy trial."

The Sixth Circuit recognizes that the military and civilian courts enjoy concurrent jurisdiction which affords the proper authorities "a choice of forum in which to prosecute the offender, an election generally resolved by considerations or comity and relevant military and civilian interests." (6th Cir. Decision, p.11). While it is true that there is a choice of forum, no case has been cited which indicate that under these circumstances the same sovereign can resort to both forums rather than exercising the choice or forum recognized by the Sixth Circuit.

The Trial Court made a specific finding or fact that the purpose or the withdrawal of the court martial charges was to evade the speedy trial guarantees

of the Military Justice System. The District Court's findings of fact on these issues will be sustained unless they are clearly erroneous. United States v. Stearns, 707 F.2d 391 (9th Cir. 1983).

The Petitioner submits that there can be no conclusion other than that the withdrawal of charges from court martial prosecution was to avoid the speedy trial guarantees previously discussed. This does constitute a violation that under the circumstances of this case would justify a dismissal of charges.

II

The District Judge's Ruling was Required as a Matter of Public Policy Since the Government's Argument would Totally Abrogate the Right to a Speedy Trial in the Military Justice System, to the Prejudice of the Petitioner and Other Servicemen.

It is obvious in the record that the District Court Judge was mindful of the public policy and broader implications of a ruling allowing the civilian prosecution. As indicated in the District Court's ruling:

> "Excuse me just a minute, what this case - what's troubling in this case is that if the Government gets in a crack at Fort Gordon, Fort Benning or Fort Anywhere, and has not brought an accused to trial within the time required under military law, they say well, we'll just talk to the United States Attorney if it is something

> cognizable in the United States District Court, and if he is willing and if all of the other circuits are equal . . . then how are we to avoid the inescapable conclusion that the Government is permitted to reserve to at that prerogative an exercise it through its - through the prosecution, we didn't make it on time, he had these rights, but general, we advise you that, this is the Government prosecution talking to the convening authority at Fort Anywhere, you can, under the Talbot Doctrine, you can withdraw these charges witnout prejudice to the accused or the Government and permit it to be referred to the United States Attorney and the prosecution can go forward. (J.A. 201-202).

As mentioned earlier the Court in its ruling also criticized the right of the Government to in essence forum shop. To adopt the Government's position would be to effectively eliminate the military justice speedy trial guarantees that have long been an important part of the Military Justice System. It is exactly

this type of prosecutorial misconduct that MacDonald, supra, sought to avoid.

It is also significant that that the instant case in essence involves the same sovereign. The Government attempts to criticize the District Court's ruling by making many references to situations where a procedural dismissal in the State Court would not preclude a subsequent prosecution in Federal Court. They argue that since successive prosecutions are allowed in these situations that the Army prosecutors would not have believed that the withdrawal of the court martial charges would have barred civilian prosecution. United States v. Wheeler, 435 U.S. 313, 98 S.Ct. 1079 (1978) contains a clear discussion of the dual sovereignty concept. The Wheeler decision observed that the dual sovereignty concept does not apply in every instance where successive cases are

brought by nominally different prosecuting entities. They refer to the leading case of Grafton v. United States, 206 U.S. 333, 27 S.Ct. 749 (1907). The Grafton decision held that a soldier who had been acquitted of murder by a federal court martial could not be retried for the same offense by a territorial court in the Philippines.

Puerto Rico v. Shell Co. 302 U.S. 253, 58 S.Ct. 167, also ruled that successive prosecutions by federal and territorial courts are impermissible because such courts derive their authority from the same sovereign. The Wheeler decision points out that the real test is where the ultimate source of power is derived in order to prosecute. It differentiates those cases that rest upon the basic dual structure of the federal system in which both the states and the national governments are separate

political communities from those situations such as are presented in the instant case where the power to prosecute is derived from the same governing body. It recognizes that the dual sovereignty concept does not permit a single sovereign to impose multiple punishment for a single offense merely by the expedient of establishing multiple political subdivisions with the power to punish crimes.

The Petitioner submits that the logic in United States v. Wheeler is applicable to the instant case.

This is clearly a situation where the same sovereign does exactly what is condemned in MacDonald, supra, and evades the speedy trial guarantee of a defendant.

While upholding the dual sovereignty concept particularly as between the states and the federal government, the

United States Supreme Court did recognize in Rinaldi v. United States, 434 U.S. 22, 98 S.Ct. 81 (1977) that there have to be some limitations to the multiple prosecution power. In Rinaldi it was stated:

> In response to the Court's continuing sensitivity to the fairness implications of the multiple prosecution power, the Justice Department adopted the policy of refusing to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement. 434 U.S. at 28, 98 S.Ct. at 85 (1977).

This decision, of course, dealt with the Petite policy which was designed to basically limit the exercise of the power of successive prosecutions for the same offenses. The primary purpose of the Petite policy was to deal with concepts of protecting individual citizens from any possibility of unfairness associated

with multiple prosecutions. It is submitted that the spirit of Rinaldi would clearly be applicable for the facts presented in the instant case.

It is an inescapable conclusion that to adopt the position of the Government in this case would totally abrogate the speedy trial guarantees for those servicemen who are charged with court martial offenses for which prosecution is also available in a Federal District Court forum.

III

There is No Precedent for the Government's Primary Argument That a Military Dismissal would Not Bar a Federal Civilian Prosecution for the Same Offenses under the Facts of this Case.

A reading of the Government's argument in the Sixth Circuit seems to

lead to the conclusion that their primary argument deals with the fact that the District Court's ruling is premised upon the mistaken belief that a dismissal in the military for violation of Rule 707(a) would not have barred a civilian prosecution for the same offense. It is argued by the Government that when a member of the military forces is prosecuted in the District Court that the speedy trial rights are governed only by the Federal Speedy Trial Act, 18 U.S.C. 3161, et seq. Again, the Government seems to totally overlook the compelling language and logic in MacDonald. No reported decision in support of their conclusion that a dismissal under these circumstances would not bar a federal civilian prosecution has yet been cited. The Petitioner submits that one reason why the Government can find no cases to substantiate their position is that the

instant factual situation presents one of the few times where a United States Attorney has been put in the difficult situation of accepting an abortive military prosecution to evade the speedy trial guarantees afforded by the military. Had this case been allowed to proceed to a ruling by the military judge and had the Government availed themselves of the appellate rights within the Military Justice System it can safely be said that upon the conclusion of those hearings it would have been highly unlikely that any requested federal civilian intervention would have been made. As of this time the Government has not cited any authority for the proposition that when a speedy trial has been clearly denied in the military and where the constitutional rights of individual servicemen have thus been violated that the civilian courts can automatically assume jurisdiction.

It is clear from the Record and the Decision of the Sixth Circuit that this important question of Federal law has not been clearly addressed by this Court. The Petitioner submits that to the degree it has been addressed that the Decision of the Sixth Circuit is in conflict with the spirit and rationale of the MacDonald decision decided by this Court. It is submitted that the Decision of the Sixth Circuit Court of Appeals clearly gives military authorities the right to begin court-martial proceedings and know that they can violate a defendant's military speedy trial provisions with impunity since any violation may be rendered harmless by the convening authority withdrawing court-martial charges momentarily before their dismissal and requesting the local United States Attorney's Office to assume jurisdiction. It seems clear from this set of facts

that there will be increased use of the civilian forums for what were formerly considered offenses triable as a matter of comity by the military authorities.

The Petitioner further submits that the Decision of the Sixth Circuit has so far departed from the normal and accepted view of the Sixth Amendment and Due Process guarantees that this Court is called to exercise its powers of supervision to correct the erroneous decision of the Sixth Circuit.

CONCLUSION

For the above-stated reasons, the Petitioner respectfully requests the Court to issue a Writ of Certiorari to the Court of Appeals for the Sixth Circuit remanding the case for reinstatement of the Order of Dismissal for the reasons set forth in the original Opinion of the District Court Judge.

Respectfully submitted,

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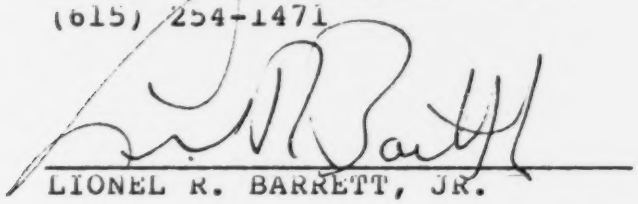

LIONEL R. BARRETT, JR.

CERTIFICATE OF SERVICE

I hereby certify that I have provided the requisite number of true and exact copies of this Petition for Writ of Certiorari to Patty Merkamp Stemler, Attorney at Law, Post Office Box 899, Ben Franklin Station, Washington, D. C. 20044-0899, to Mr. Joe B. Brown and Mr. William T. Warren, III, Office of the United States Attorney, 879 United States Courthouse, Nashville, Tennessee 37203, and to the Honorable Charles Fried, Solicitor General, Department of Justice, Washington, D.C. 20530, pursuant to Rule 28.5 of this Court.

On this the 19th day of November, 1987.

LIONEL R. BARRETT, JR.

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-5541

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

ASA RICHARD TALBOT,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Middle District of Tennessee.

Decided and Filed July 31, 1987

Before: ENGEL, KRUPANSKY and NELSON, Circuit Judges.

KRUPANSKY, Circuit Judge. The plaintiff, the United States Government (the Government), appealed the district court's dismissal of an indictment against the defendant Asa Richard Talbot (the defendant or Talbot), which had charged him with assault with intent to commit a felony on a military reservation in violation of 18 U.S.C. § 113.

The record disclosed the following facts. During the year 1985, the defendant Talbot, a medical doctor with a specialty in otolaryngology with the rank of colonel in the U.S. Army Medical Corps, was assigned to the Blanchfield Army Community Hospital, which military installation is geographically

situated within the State of Tennessee. The defendant was accused of sexually molesting an eleven-year-old female patient while treating her for an ear infection on or about May 28 and 31, 1985. The girl and her mother reported the incidents to the Army Criminal Investigation Division (CID) at Fort Campbell, the situs of the hospital. On June 29, 1985, as a result of the complaint, Colonel Robert Kreutzmann (Col. Kreutzmann), the defendant's commanding officer, in an oral order: (1) relieved Talbot from his duties as a medical officer; (2) designated his living quarters as his duty station; and (3) directed Talbot to avoid all contact or association with the alleged victims or any witnesses. Subsequently, a sixteen-year-old female patient of the defendant also alleged that the defendant had sexually molested her on or about June 25 and 26, 1985 while treating her subsequent to a tonsillectomy.

On August 12, 1985, charges arising from the foregoing incidents, together with four additional alleged instances of sexual harassment of adult female military officers on the hospital staff, were preferred against the defendant by Col. Kreutzmann. An impartial officer was appointed to formally investigate the accusations pursuant to Article 32 of the Uniform Code of Military Justice (UCMJ) and to recommend disposition of the charges. The charges were subsequently dismissed without prejudice and the defendant was nominally transferred to another command at Fort Campbell on September 27, 1985 because of an appearance of command influence arising from a publicly expressed opinion attributed to Col. Kreutzmann that all instances of physician misconduct be referred to court-martial without evaluation of the underlying merit or circumstances of the accusations.

On October 8, 1985, new charges were preferred against Talbot predicated upon the incidents that had allegedly supported the previous military indictment and a second Article 32 pretrial investigation was conducted. On October 29, 1985, Major General Burton D. Patrick (Gen. Patrick), the

commanding general of Fort Campbell, acting upon the disclosures of the second investigation, ordered a general court-martial be convened to consider the outstanding complaints against Talbot. The defendant requested and was granted a two-month continuance on November 8, 1985 and his trial was scheduled to commence on January 18, 1986.

On Friday, January 10, 1986, four days after the continuance had expired, defendant's counsel filed a motion to dismiss the pending charges, asserting a denial of the defendant's right to a speedy trial in derogation of Rules for Courts-Martial (R.C.M.) 707, which mandated the commencement of trial within 120 days "after notice to the accused of preferral of charges under R.C.M. 308 or the imposition of restraint under R.C.M. 304, whichever is earlier." R.C.M. 707(a).[1]

(Text continued on page 8)

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[1]R.C.M. 707 provided in its entirety as follows:

Rule 707. Speedy trial

(a) *In general.* The accused shall be brought to trial within 120 days after notice to the accused of preferral of charges under R.C.M. 308 or the imposition of restraint under R.C.M. 304, whichever is earlier.

(b) *Accountability.*

(1) *In general.* The date on which the accused is notified of the preferral of charges or the date on which pretrial restraint is imposed shall not count for purpose of computing the time under subsection (a) of this rule. The date on which the accused is brought to trial shall count.

(2) *Inception.* If charges are dismissed, if a mistrial is granted, or—when no charges are pending—if the accused is released from pretrial restraint for a significant period, the time under this rule shall run only from the date on which charges or restraint are reinstituted.

(3) *Termination.* An accused is brought to trial within the meaning of this rule when:

(A) A plea of guilty is entered to an offense; or

(B) Presentation to the factfinder of evidence on the merits begins.

(4) *Multiple charges.* When charges are preferred at different times, the inception for each shall be determined from the date on which the accused was notified of preferral or on which restraint was imposed on the basis of that offense.

(c) *Exclusions.* The following periods shall be excluded when determining whether the period in subsection (a) of this rule has run —

(1) Any periods of delay resulting from other proceedings in the case, including:

(A) Any examination into the mental capacity or responsibility of the accused;

(B) Any hearing on the capacity of the accused to stand trial and any time during which the accused lacks capacity to stand trial;

(C) Any session on pretrial motions;

(D) Any appeal filed under R.C.M. 908 unless it is determined that the appeal was filed solely for the purpose of delay with the knowledge that it was a totally frivolous and without merit; and

(E) Any petition for extraordinary relief by either party.

(2) Any period of delay resulting from unavailability of a military judge when the unavailability results from extraordinary circumstances.

(3) Any period of delay resulting from a delay in a proceeding or a continuance in the court-martial granted at the request or with the consent of the defense.

(4) Any period of delay resulting from a failure of the defense to provide notice, make a request, or submit any matter in a timely manner as otherwise required by this Manual.

(5) Any period of delay resulting from a delay in the Article 32 hearing or a continuance in the court-martial at the request of the prosecution if:

(A) The delay or continuance is granted because of unavailability of substantial evidence relevant and necessary to the prosecution's case when the Government has exercised due diligence to obtain such evidence and there exists at the time of the delay grounds to believe that such evidence would be available within a reasonable time; or

(B) The continuance is granted to allow the trial counsel additional time to prepare the prosecution's case and additional time is justified because of the exceptional circumstances of the case.

(6) Any period of delay resulting from the absence or unavailability of the accused.

(7) Any reasonable period of delay when the accused is joined for trial with a coaccused as to whom the time for trial has not yet run and there is good cause for not granting a severance.

(8) Any other period of delay for good cause, including unusual operational requirements and military exigencies.

(d) *Arrest or confinement.* When the accused is in pretrial arrest or confinement under R.C.M. 304 or 305, immediate steps shall be taken to bring the accused to trial. No accused shall be held in pretrial arrest or confinement in excess of 90 days for the same or related charges. Except for any periods under subsection (c)(7) of this rule, the periods described in subsection (c) of this rule shall be excluded for the purpose of computing when 90 days has run. The military judge may, upon a showing of extraordinary circumstances, extend the period by 10 days.

(e) *Remedy.* Failure to comply with this rule shall result in dismissal of the affected charges upon timely motion by the accused.

R.C.M. 707. *See* Executive Order 12473 (Apr. 13, 1984), 49 Fed. Reg. 17152 (Apr. 23, 1984), as amended by Executive Order 12484 (July 13, 1984), 49 Fed. Reg. 28825 (July 17, 1984). *Compare* 18 U.S.C. § 3161 *et seq.* (Speedy Trial Act).

R.C.M. 707(a), as indicated, required the court-martial to commence within 120 days after notice to the accused of preferral of charges under R.C.M. 308 or the imposition of restraint under R.C.M. 304. R.C.M. 304 in turn provided as follows:

Rule 304. Pretrial restraint

(a) *Types of pretrial restraint.* Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) *Conditions on liberty.* Conditions on liberty are imposed by orders directing a person to do or refrain from doing speci-

fied acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) *Restriction in lieu of arrest.* Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) *Arrest.* Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) *Confinement.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. *See* R.C.M. 305.

(b) *Who may order pretrial restraint.*

(1) *Of civilians and officers.* Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

(2) *Of enlisted persons.* Any commissioned officer may order pretrial restraint of any enlisted person.

(3) *Delegation of authority.* The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer.

(4) *Authority to withhold.* A superior competent authority may withhold from a subordinate the authority to order pretrial restraint.

(c) *When a person may be restrained.* No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person to be restrained committed it; and

(3) The restraint ordered is required by the circumstances.

(d) *Procedures for ordering pretrial restraint.* Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the restraint, including its terms or limits. The order to an enlisted person shall be delivered personally by the authority who issues it or through other persons subject to the code. The order to an officer or a civilian shall be delivered personally by the authority who issues it or by another commissioned officer. Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

(e) *Notice of basis for restraint.* When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint.

(f) *Punishment prohibited.* Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

(g) *Release.* Except as otherwise provided in R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate when a sentence is adjudged, the accused is acquitted of all charges, or all charges are dismissed.

(h) *Administrative restraint.* Nothing in this rule prohibits limitations on a servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.

R.C.M. 304. *See also* R.C.M. 305 (pretrial confinement).

An amendment to the Manual for Courts-Martial effected subsequent to the instant facts modified R.C.M. 707(a) to read as follows:

Defense counsel argued that the conditions imposed upon the defendant's liberty by Col. Kreutzmann on June 29, 1985 had triggered the 120-day limitation period, which expired on October 27, 1985, twelve days before defense counsel requested the two-month continuance. On Saturday, January 11, 1986, the day after the defendant's motion to dismiss was filed, the military prosecutors advised defense counsel of their election to withdraw all military charges against Talbot and to refer the matter to the United States Attorney for the Middle District of Tennessee for evaluation and further action. On or about Monday, January 13, 1986, subsequent

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(a) *In general.* The accused shall be brought to trial within 120 days after the earlier of:

(1) Notice to the accused of preferral of charges under R.C.M. 308; or

(2) The imposition of restraint under R.C.M. 304(a)(2)-(4).

Executive Order 12550 (Feb. 19, 1986), 51 Fed. Reg. 6497 (Feb. 25, 1986). The foregoing amendment eliminated the imposition of conditions on liberty (under R.C.M. 304(a)(1)) as a triggering mechanism for R.C.M. 707 speedy trial purposes, although the imposition of restriction in lieu of arrest, arrest, or confinement (R.C.M. 304(a)(2)-(4)) continued to implicate military speedy trial protections. By its own terms, however, that amendment did not apply to any conditions on liberty imposed before March 1, 1986 and directed that the effect of such a condition on liberty was to be considered under R.C.M. 707(a) as it existed before that date. R.C.M. 707 has also been recently amended to provide that the speedy trial period in subsection (a) also commences with a servicemember's entry on active duty under R.C.M. 204, concerning the exercise of court-martial jurisdiction over reserve component personnel. *See* Executive Order 12586 (Mar. 3, 1987), 52 Fed. Reg. 7103 (Mar. 9, 1987).

With respect to discussions addressing the scope of speedy trial protections in the context of the military, *see, e.g.*, R.C.M. 707 commentary analysis; D. Schlueter, Military Criminal Justice: Practice and Procedure §§ 5-3, 13-3(C) (2d ed. 1987); H. Moyer, Jr., Justice and the Military §§ 2-345-70, 2-470-82 (1972); M. Kadish, G. Roberts & R. Brofman, 3 Criminal Defense Techniques, *Defense of Servicemen* (Ch. 61) §§ 61.04, .11[3][c][vi] (M. Eisenstein, S. Allen & D. Winston eds. 1986); 3 Fed. Proc. L.Ed., *Armed Forces* § 5:112 (1981 & Supp. 1986).

to a review and discussion of the case with the military prosecuting authorities, the United States Attorney assumed jurisdiction of the inquiry. On January 14, 1986, Gen. Patrick ordered all outstanding charges pending against the defendant to be dismissed without prejudice to the government or the accused, noting that the United States Attorney had assumed jurisdiction of the case. Gen. Patrick's action was confirmed in a written order and memorandum on January 24, 1986.

A federal grand jury returned an indictment against the defendant on February 19, 1986. The true bill charged violations of 18 U.S.C. § 113 in three counts: counts one and two alleged that the defendant had committed assault with intent to commit the felony of aggravated sexual battery on the eleven-year-old female patient; and count three charged assault with intent to commit the felony of sexual battery on the sixteen-year-old patient.[2] The defendant appeared in court to answer the indictment on February 21, 1986. On April 1, 1986, the defendant moved for a dismissal asserting that his double jeopardy, speedy trial, and due process rights had been violated by the initiation of federal charges in the United States District Court for the Middle District of Tennessee. The district court conduted an evidentiary hearing on the motion on April 8 and 10, 1986, at the conclusion of which it issued oral findings of fact and conclusions of law and dismissed the indictment.

In dismissing the indictment, the district court concluded that the 120-day speedy trial limitation mandated by R.C.M.

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[2]18 U.S.C. § 113 provides: "Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows: . . . (b) Assault with intent to commit any felony, except murder or rape, by fine of not more than $3,000 or imprisonment for not more than ten years, or both." The indictment specified that the described actions were felonies as defined by Tennessee law and occurred on property acquired for use and under the exclusive jurisdiction of the United States government.

707 had commenced to accrue on June 29, 1985 when Col. Kreutzmann's initial order restrained the defendant's liberty and that the military authorities had intentionally acted in bad faith by deferring jurisdiction over the matter to the United States Attorney's office to circumvent the military court's consideration and disposition of the defendant's motion to dismiss based upon asserted speedy trial infringements. Although the district court acknowledged that the United States Attorney's prosecution of the proceedings in federal court had been timely and had comported with the provisions of the federal Speedy Trial Act in all respects, the court considered the criminal action initiated by the federal grand jury to have been tainted by the actions of the military authorities and offensive to public policy so as to warrant dismissal of the indictment. On appeal, the defendant adopted the legal reasoning and public policy justifications articulated by the district court and invoked the constitutional protections of due process, speedy trial, and double jeopardy to support the dismissal. The Government, on the other hand, argued before this court that dismissal of the indictment by the district court was unwarranted inasmuch as the prosecution initiated by the United States Attorney did not constitute an infringement of any of the defendant's rights, constitutional or otherwise, despite the prior proceedings pursued by the military authorities.

Resolution of the instant appeal necessitates an initial examination of the relationship between military and civilian prosecuting authorities. Case law has long recognized in a variety of contexts that the military by necessity constitutes a specialized environment separate from civilian society. *See, e.g., United States v. Stanley,* 55 U.S.L.W. 5101, 5103-05 (1987); *United States v. Johnson,* 107 S.Ct. 2063, 2069, 95 L.Ed.2d 648 (1987); *Goldman v. Weinberger,* 475 U.S. 503, 106 S.Ct. 1310, 1312-13, 89 L.Ed.2d 478 (1986); *Parker v. Levy,* 417 U.S. 733, 743, 94 S.Ct. 2547, 2555-56, 41 L.Ed.2d 439 (1974); *United States v. Mariea,* 795 F.2d 1094, 1100 (1st Cir.1986); *Satterfield v. United States,* 788 F.2d 395, 398

(6th Cir. 1986). This independence extends to the military justice system, which embodies a unique jurisprudence separate and apart from the law which governs in the federal judicial establishment, with different procedures, protections, and personnel, and which is designed to accomplish goals diverse from those served by the civilian criminal justice system. *See, e.g., Solorio v. United States,* 55 U.S.L.W. 5038, 5041 (1987); *Chappell v. Wallace,* 462 U.S. 296, 300-05, 103 S.Ct. 2362, 2365-68, 76 L.Ed.2d 586 (1983); *Schlesinger v. Councilman,* 420 U.S. 738, 746, 757, 95 S.Ct. 1300, 1307, 1313, 43 L.Ed.2d 591 (1975); *Parker v. Levy,* 417 U.S. 733, 744, 94 S.Ct. 2547, 2556, 41 L.Ed.2d 439 (1974); *Gosa v. Mayden,* 413 U.S. 665, 672-75, 93 S.Ct. 2926, 2932-34, 37 L.Ed.2d 873 (1973); *Relford v. Commandant, U.S. Disciplinary Barracks,* 401 U.S. 355, 365-69, 91 S.Ct. 649, 655-57, 28 L.Ed.2d 102 (1971); *O'Callahan v. Parker,* 395 U.S. 258, 262-65, 89 S.Ct. 1683, 1685-87, 23 L.Ed.2d 291 (1969); *Reid v. Covert,* 354 U.S. 1, 36, 77 S.Ct. 1222, 1240, 1 L.Ed.2d 1148 (1957); *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 17-18, 76 S.Ct. 1, 5-6, 100 L.Ed. 8 (1955); *Burns v. Wilson,* 346 U.S. 137, 140, 73 S.Ct. 1045, 1047, 97 L.Ed. 1508 (1953); *United States v. Mariea,* 795 F.2d 1094, 1100-01 (1st Cir. 1986); *Baker v. Schlesinger,* 523 F.2d 1031, 1035 (6th Cir. 1975), *cert. denied,* 424 U.S. 972, 96 S.Ct. 1473, 47 L.Ed.2d 741 (1976); *Seepe v. Department of the Navy,* 518 F.2d 760 (6th Cir. 1975).

As a consequence of the foregoing, it is well established that, under proper circumstances, as here, military and civilian courts enjoy concurrent jurisdiction to prosecute armed forces personnel for criminal wrongdoing, inasmuch as the military justice system was designed to supplement rather than displace the civilian penal system, and such concurrent jurisdiction affords the pertinent authorities a choice of forum in which to prosecute the offender, an election generally resolved by considerations of comity and relevant military and civilian interests. *See, e.g., United States v. Debevoise,* 799 F.2d 1401, 1403 (9th Cir. 1986); *United States v.*

Mariea, 795 F.2d 1094, 1101 (1st Cir. 1986); *United States v. Colon-Padilla,* 770 F.2d 1328, 1330-32 (5th Cir. 1985); *United States v. Walker,* 552 F.2d 566, 567 (4th Cir.), *cert. denied,* 434 U.S. 848, 98 S.Ct. 157, 54 L.Ed.2d 116 (1977). *See also* R.C.M. 201 (courts-martial jurisdiction).[3] Accordingly, the federal district court in the instant circumstances possessed jurisdiction, concurrent with that of the military tribunal, to try the defendant for his alleged conduct in violation of federal law, absent any double jeopardy implications.

With respect to the issue of double jeopardy, it is apparent that no such constitutional violation can be fashioned from the instant record. Jeopardy does not attach in a criminal case until a defendant is put to trial before the trier of fact, which in a jury trial occurs when a jury is impaneled and sworn and in a non-jury trial when the court formally commences the trial by accepting evidence. *See Crist v. Bretz,* 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978); *United States v. Smith,* 584 F.2d 759, 761 (6th Cir. 1978), *cert. denied,* 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979). Inasmuch as the military proceedings in the instant case never reached that point, the subsequent grand jury indictment did not run afoul of double jeopardy principles.

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[3]For materials addressing in greater detail the procedure and jurisdiction of courts-martial and the relationship of the military justice system to civilian judicial proceedings, *see, e.g.,* D. Schlueter, Military Criminal Justice: Practice and Procedure §§ 4-10-12 (2d ed. 1987); H. Moyer, Jr., Justice and the Military §§ 1-600-15 (1972); M. Kadish, G. Roberts & R. Brofman, 3 Criminal Defense Techniques, *Defense of Servicemen* (Ch. 61) (M. Eisenstein, S. Allen & D. Winston eds. 1986); 13 Wright & Miller, Federal Practice & Procedure § 3508 at 35-36 (1984); 17 Wright & Miller, *supra,* § 4106 at 280 (1978); 3 Fed. Proc. L.Ed., *Armed Forces* §§ 5:60-:89, 5:383-:413 (1981 & Supp. 1986); Annot., 14 A.L.R. Fed. 152; Annot., 15 A.L.R.2d 387; 54 Am. Jur.2d, *Military and Civil Defense* §§ 210-86 (1971 & Supp. 1986); 6 C.J.S., *Armed Services* §§ 153-91 (1975 & Supp. 1986). *See also generally* R. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial,* 108 Mil. L. Rev. 5 (1985).

The defendant's sole remaining contention, that the federal grand jury indictment and prosecution contravened due process and general public policy considerations in light of the prior military proceedings, is equally without merit.[4] To prove a violation of the Fifth Amendment due process clause, the defendant must demonstrate that the challenged actions

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[4]The court notes at this juncture that, although the defendant on appeal (as did the district court in its bench ruling on the motion to dismiss) made reference to the right to a speedy trial, he did not vigorously press any claim in this regard, whether premised upon the Speedy Trial Act (STA) or constitutional provisions. In any case, as the district court correctly concluded, the prosecution of the criminal action in the federal district court by the United States Attorney's office proceeded expeditiously and in accordance with the STA. With respect to the constitutional guarantee to a speedy trial embodied in the Sixth Amendment, the defendant failed to establish that the four factors pertinent to such an inquiry, namely, the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant, militated in favor of finding a Sixth Amendment violation on these facts. *See United States v. Loud Hawk*, 474 U.S. 302, 106 S.Ct. 648, 655, 88 L.Ed.2d 640 (1986); *United States v. MacDonald*, 456 U.S. 1, 6-9, 102 S.Ct. 1497, 1501-02, 71 L.Ed.2d 696 (1982); *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S.Ct. 2182, 2192-93, 33 L.Ed.2d 101 (1972); *Redd v. Sowders*, 809 F.2d 1266, 1268-72 (6th Cir. 1987); *United States v. Atisha*, 804 F.2d 920, 929 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 955, 93 L.Ed.2d 1003 (1987); *United States v. Holyfield*, 802 F.2d 846, 848 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 1298, 94 L.Ed.2d 154 (1987). Similarly, the defendant did not demonstrate that he was subjected to excessive *pre*indictment delay, which, although cognizable under the due process clause of the Fifth Amendment rather than the Sixth Amendment speedy trial clause, required a showing that the defendant suffered actual and substantial prejudice as a result of the delay and that such delay was intentionally pursued by the government to gain a tactical advantage which offended fundamental conceptions of justice, fair play, and decency. *See MacDonald*, 456 U.S. at 6-9, 102 S.Ct. at 1501-02; *United States v. Lovasco*, 431 U.S. 783, 788-90, 97 S.Ct. 2044, 2048, 52 L.Ed.2d 752 (1977); *United States v. Marion*, 404 U.S. 307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971); *Atisha*, 804 F.2d at 928; *United States v. Lawson*, 780 F.2d 535, 541-42 (6th Cir. 1985); *United States v. Duncan*, 763 F.2d 220, 222 (6th Cir. 1985); *United States v. Greene*, 737 F.2d 572, 574 (6th Cir. 1984).

are inconsistent with fundamental fairness. *See generally* 1 W. LaFave & J. Israel, Criminal Procedure § 2.4 (1984). The Supreme Court in *United States v. Lovasco,* 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), emphasized the constricted parameters of such an inquiry:

> [T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. Judges are not free, in defining "due process," to impose on law enforcement officials our "personal and private notions" of fairness and to "disregard the limits that bind judges in their judicial function." *Rochin v. California,* 342 U.S. 165, 170, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). Our task is more circumscribed. We are to determine only whether the action complained of . . . violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions," *Mooney v. Holohan,* 294 U.S. 103, 112, 55 S.Ct. 340, 342, 79 L.Ed. 791 (1935), and which define "the community's sense of fair play and decency," *Rochin v. California, supra,* 342 U.S., at 173, 72 S.Ct. at 210. See also *Ham v. South Carolina,* 409 U.S. 524, 526, 93 S.Ct. 848, 850, 35 L.Ed.2d 46 (1973); *Lisenba v. California,* 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941); *Hebert v. Louisiana,* 272 U.S. 312, 316, 47 S.Ct. 103, 104, 71 L.Ed. 270 (1926); *Hurtado v. California,* 110 U.S. 516, 535, 4 S.Ct. 111, 120, 28 L.Ed. 232 (1884).

Id. at 790, 97 S.Ct. at 2049.

While the courts retain inherent supervisory authority over the law enforcement process which culminates in the criminal proceedings brought before them, courts may not utilize their supervisory powers to fashion remedies calculated to deter perceived future misconduct where the defendant has not suffered an infringement of a constitutional right. *See United*

States v. Payner, 447 U.S. 727, 735, 100 S.Ct. 2439, 2446, 65 L.Ed.2d 468 (1980); *United States v. Gjieli*, 717 F.2d 968, 977-79 (6th Cir. 1983), *cert. denied*, 465 U.S. 1101, 104 S.Ct. 1595, 80 L.Ed.2d 127 (1984). Even under circumstances where a constitutional right of the defendant has been violated, deliberately or otherwise, the defendant is entitled to the extreme sanction of dismissal of the indictment only where he can prove that he was demonstrably prejudiced by the violation. *See United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 942-43, 89 L.Ed.2d 50 (1986); *United States v. Morrison*, 449 U.S. 361, 365, 101 S.Ct. 665, 668, 66 L.Ed.2d 564 (1981). *See also United States v. Loud Hawk*, 106 S.Ct. 648, 657, 88 L.Ed.2d 640 (1986)("severe remedy of dismissing the indictment").[5]

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[5]Typically the issue of dismissal of a criminal indictment for alleged prosecutorial or governmental misconduct arises in the context of purportedly prejudicial actions of the prosecutor before the grand jury in seeking an indictment. Under limited circumstances, a court may dismiss an indictment for such prosecutorial misconduct before the grand jury on the basis of Fifth Amendment due process or the court's inherent supervisory powers. *See, e.g., United States v. Venegas*, 800 F.2d 868, 869 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 1325, 94 L.Ed.2d 177 (1987); *United States v. Rodriguez*, 738 F.2d 13, 16-17 (1st Cir. 1984); *United States v. Pino*, 708 F.2d 523, 530-31 (10th Cir. 1983); *United States v. Pabian*, 704 F.2d 1533, 1539-40 (11th Cir. 1983); *United States v. Cederquist*, 641 F.2d 1347, 1352 (9th Cir. 1981). Applying the foregoing principles, this circuit has held that a court may not order dismissal of an indictment under its supervisory power unless the defendant has demonstrated that prosecutorial misconduct is a long-standing or common abuse in the district and that he has been prejudiced by the abusive actions. *See United States v. Griffith*, 756 F.2d 1244, 1249 (6th Cir.), *cert. denied*, 106 S.Ct. 114, 88 L.Ed.2d 93 (1985). This circuit has also consistently concluded that alleged due process violations were not established nor was the extraordinary remedy of dismissal of the indictment or reversal of a conviction warranted on the facts where the defendant raised a claim of assertedly outrageous conduct on the part of the police or government investigators which preceded and purportedly tainted the subsequent indictment and prosecution of the criminal case. *See United States v. Davis*, 809 F.2d 1194, 1209 (6th Cir. 1987); *United States v. Qaoud*, 777 F.2d 1105, 1110-

In the instant matter, the military convening authority, Gen. Patrick, was empowered pursuant to applicable military rules to withdraw the charges preferred against the defendant "for any reason" at any time before findings of the court-martial were announced. R.C.M. 604(a). It is well settled that the procedural aspects of the administration of criminal justice abound with situations in which the exercise of discretion by a myriad of participants occupies a significant role in determining the destiny of an alleged offender. *See generally* W. LaFave & A. Scott, Criminal Law 18 (1972). *Cf. McCleskey v. Kemp,* 107 S.Ct. 1756, 1768-69, 1777, 95 L.Ed.2d 262 (1987); *United States v. Nathan,* 816 F.2d 230, 234 (6th Cir. 1987). Prosecuting authorities in particular have historically exercised wide latitude in initiating, prosecuting, or dismissing criminal actions within the parameters evidenced in this case without implications of shocking the conscience nor of violating fundamental conceptions of justice, fair play, and decency.[6]

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11 (6th Cir. 1985); *United States v. Robinson,* 763 F.2d 778, 785-86 (6th Cir. 1985); *United States v. Norton,* 700 F.2d 1072, 1075-76 (6th Cir.), *cert. denied,* 461 U.S. 910, 103 S.Ct. 1885, 76 L.Ed.2d 814 (1983); *United States v. Bowling,* 666 F.2d 1052, 1054 (6th Cir. 1981), *cert. denied,* 455 U.S. 960, 102 S.Ct. 1475, 71 L.Ed.2d 680 (1982); *United States v. Brown,* 635 F.2d 1207, 1211-14 (6th Cir. 1980); *United States v. Leja,* 563 F.2d 244, 245-47 (6th Cir. 1977), *cert. denied,* 434 U.S. 1074, 98 S.Ct. 1263, 55 L.Ed.2d 780; 436 U.S. 948, 98 S.Ct. 2853, 56 L.Ed.2d 790 (1978). *See generally* Annot., 57 A.L.R. Fed. 824.

[6]The defendant's reliance upon language of the Supreme Court in *United States v. MacDonald,* 456 U.S. 1, 102 S.Ct. 1497, 71 L.Ed.2d 696 (1982), is misplaced. In *MacDonald,* the Court concluded that the interim period of time between the dismissal of military charges and the subsequent indictment by a federal grand jury could not be considered in determining whether the delay in bringing the defendant to trial violated his Sixth Amendment right to a speedy trial. While the Court did observe in that case that the defendant was free of restrictions during that interim period and that there had been no allegation that military authorities had acted in bad faith in dismissing the mili-

The determination of the United States Attorney to subsequently proceed with prosecution of the defendant in federal district court was itself a decision of a uniquely discretionary character. The Supreme Court in *Wayte v. United States,* 470 U.S. 598, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985), recently elaborated upon the considerable leeway of the Government in this regard:

> In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. *United States v. Goodwin,* 457 U.S. 368, 380, n.11, 102 S.Ct. 2485, 2492, n.11, 73 L.Ed.2d 74 (1982); accord, *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 248, 100 S.Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes,* 434 U.S. 357, 364, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial

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tary charges and later reinstituting charges as contained in the grand jury indictment to evade the defendant's speedy trial rights, *id.* at 10 & n.12, 102 S.Ct. at 1503 & n.12, the Court was not faced with nor did it address the question presented herein, namely whether maintenance of the federal civilian prosecution subsequent to the withdrawal of charges by military authorities was barred by due process or other considerations.

> supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Id. at 607-08, 105 S.Ct. at 1531.[7]

There was no allegation in this case that the United States Attorney's office itself engaged in bad faith or misconduct of any sort in assuming prosecution of the matter. Moreover, the defendant failed to articulate any substantial actual prejudice to or impairment of his defense against the indictment as a result of the procedural course of the action, nor can this court discern any cognizable prejudice to his position. Dismissal of the federal grand jury indictment based on public policy, supervisory, or other considerations to assertedly bolster future compliance with pertinent time requirements imposed in the context of the independent military court system, as the defendant has urged on appeal, would in these circumstances constitute an improvident exercise of authority.[8] In sum, the instant federal prosecution did not

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[7]This court notes that the defendant asserted no claim of purported selective prosecution by the Government in either the district court or on appeal and that such a position would not be meritorious in any case in light of the stringent standards that a defendant must satisfy in order to establish such a claim. *See Wayte*, 470 U.S. at 607-10, 105 S.Ct. at 1531-32; *United States v. Bustamante*, 805 F.2d 201, 202 (6th Cir. 1986); *United States v. Hazel*, 696 F.2d 473, 474-75 (6th Cir. 1983).

[8]In light of the instant disposition, this court need not and does not examine the merits of the defendant's interpretation of the pertinent military speedy trial provisions as they might have potentially impacted upon his court-martial prosecution prior to the withdrawal of military charges.

violate the defendant's statutory or constitutional speedy trial rights or double jeopardy considerations, did not rise to a level violative of due process, did not result in actual prejudice to the defendant, and did not warrant the extraordinary exercise of supervisory authority or the extreme sanction of dismissal of the indictment.

Accordingly, the judgment of the district court dismissing the indictment is REVERSED and the case is REMANDED to the district court for further proceedings consistent with the foregoing opinion.

Def
4-8-86

DEPARTMENT OF THE ARMY
HEADQUARTERS 101ST AIRBORNE DIVISION (AIR ASSAULT) AND FORT CAMPBELL
FORT CAMPBELL, KENTUCKY 42223-6000

REPLY TO
ATTENTION OF:

AFZB-OC

24 JAN 1986

MEMORANDUM FOR RECORD

SUBJECT: US v. TALBOT, Withdrawal and Dismissal of Charges

On 24 January 1986, I orally directed the withdrawal from General Court-Martial of all charges and specifications in the case of US v. COL Asa R. Talbot. This memorandum is to confirm that oral direction and to hereby order the charges dismissed without prejudice to the Government or the accused. This action is taken to allow referral of several of these offenses to the US Attorney for prosecution in the US District Court.

Burton D. Patrick
BURTON D. PATRICK
Major General, USA
Commanding

DEFENSE EXHIBIT NUMBER 2

CRIMINAL CASE NUMBER 3-86-00025

ADMITTED 4/8/86

CLERK

BY Judy Cook Wauford
JUDY COOK WAUFORD
COURTROOM DEPUTY

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